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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO. 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts; EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. McCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT

Preliminary Statement

Respondent respectfully requests consideration of this supplemental brief. Respondent believes that the issue reviewed here will aid this Court in resolving the questions presented by this appeal.[1]

[1] Respondent's principal brief (pp. 20-26) discusses one aspect of the problem. An adequate appraisal of the broad issue of pre-emption requires the analysis suggested in this supplemental brief.

POINT I

Petitioners carried on their alleged dispute with the motor carriers at the premises of the neutral railroad and their activities were neither protected nor prohibited by the Labor Management Relations Act, 1947. Accordingly, the Massachusetts Court had jurisdiction to grant injunctive relief.

It is conceded by the Petitioners that there was no dispute with the Respondent concerning piggy-back operations, notwithstanding that this service had been performed since 1937 (R. 50).[2]

The Petitioners allege that there was a primary dispute with the motor carriers which involved a demand for a limitation of piggy-back operations (Petitioners' brief, pp. 8, 12). However, instead of picketing the motor carriers at their readily accessible terminals, Petitioners picketed only at the premises of the neutral Respondent. The purpose of the partial strike and the picketing was, as the Massachusetts Court found, to exert pressure on the neutral Respondent and, by shutting down the railroad's facilities, prevent the Respondent from transporting trailers for the motor carriers (R. 310).

This conduct poses the question whether employees who have a dispute with their employer are engaged in protected concerted activities when they strike or picket only at the premises of a neutral party and, by forcing the latter to cease doing business with their employer, attempt to resolve the dispute in that manner.

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[2] This service had never been prohibited by a collective bargaining agreement with the motor carriers (R. 122-126). Respondent's investment at the date of trial exceeded $3,000,000. The facilities were specially adapted for this special type of transportation and the flat cars have no value for other railroad purposes (R. 58). Since the date of the decision by the State court in this case, piggy-back operations have been inaugurated by a large number of railroads which have invested millions of dollars in this service.

Respondent submits that picketing conducted exclusively at the premises of a neutral party, in order to compel a cessation of business with the primary employer, does not constitute "concerted activities" within the meaning of Section 7 of the Act. Where a union extends its picket line to the premises of other employers and thereby abandons the scene of its actual dispute with the primary employer its activities are no longer within "the protected area of primary picketing." *In the Matter of International Brotherhood of Teamsters, etc. and Shultz Refrigerated Service, Inc.*, 87 N. L. R. B. 502, 506.[3]

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[3] Secondary picketing is protected in only a limited number of well defined instances: farming out struck work to a subcontractor who is an "ally", *Douds* v. *Metropolitan Federation of Architects, etc.*, 75 F. Supp. 672 (D. C. N. Y.), but not where the subcontractor is truly independent, *In the Matter of Metal Polishers, etc. and Climax Machinery Company*, 86 N. L. R. B. 1243; inducing employees of a secondary employer to refuse to work or perform services at the premises of the primary employer whose employees are on strike, *In the Matter of Newspaper and Mail Deliverers Union of New York and Vicinity and Interborough News Company*, 90 N. L. R. B. 2135, *In the Matter of Oil Workers International Union, Local Union 346 (CIO) and The Pure Oil Company*, 84 N. L. R. B. 315; adopting and publishing unfair lists provided there is no inducement of neutral employees at the neutral employer's premises, *Amalgamated Meat Cutters, etc. and Western, Inc.*, 93 N. L. R. B. 336; *In the Matter of Denver Building and Construction Trades Council and The Grauman Company*, 87 N. L. R. B. 755; picketing of a movable situs where the employer has no accessible premises where the picketing may be conducted and the grievances communicated to the public, *In the Matter of International Brotherhood of Teamsters, etc. and Shultz Refrigerated Service, Inc.*, 87 N. L. R. B. 502, *In the Matter of Sailors' Union, etc. and Moore Dry Dock Company*, 92 N. L. R. B. 547; but not in the instances where the primary employer has readily accessible premises which the union may picket in order to publicize its dispute, *Brewery and Beverage Drivers, etc. and Washington Coca Cola Bottling Works*, 107 N. L. R. B. 299, see, too, *International Brotherhood of Teamsters, etc.*, 112 N. L. R. B. No. 3; *In the Matter of International Brotherhood of Teamsters, etc. and Sterling Beverages, Inc.*, 90 N. L. R. B. 401; where a "hot cargo" clause has been voluntarily assented to by the secondary employer, *In the Matter of International Brotherhood of Teamsters and Conway's Express*, 87 N. L. R. B., 972, sub. nom. *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906 (C. A. 2); inducement

(A) Petitioners' Secondary Activities Were Not Protected.

The locus of a union's activities determines whether or not it is protected. Concededly, where an employer and its employees have a labor dispute, picketing at the employer's premises is primary and a protected concerted activity, if the means and objectives are lawful. It follows, too, that if the Petitioners' conduct was protected, the Massachusetts Court had no jurisdiction of the suit. *International Union of United Automobile, etc., Workers, etc.* v. *O'Brien*, 339 U. S. 454.

The phrase "concerted activities" was never so liberally construed as to embrace every type of employee activity. Thus, sit-down strikes, mutinous strikes on board ship and strikes in violation of a contract, were not protected concerted activities under Section 7 of the Wagner Act. *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240; *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31; *In the Matter of Scullin Steel Company, etc.*, 65 N. L. R. B. 1294; *In the Matter of Joseph Dyson & Sons, Inc., etc.*, 72 N. L. R. B. 445.

It is clear that when the Wagner Act was amended, Congress did not intend to discard or abandon the well-established decisional precedents of the Labor Board and this Court. Thus, the first bill introduced in the House of Representatives to amend the Wagner Act, specifically excluded certain types of activity from the scope of Sec-

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limited to the secondary employer or the latter's supervisors. *In the Matter of Local Union No. 878, etc. and Arkansas Express, Inc.*, 92 N. L. R. B. 255. It is to be noted also that the proviso to Section 8(b)(4) is carefully limited to concerted action occurring at the situs of the primary dispute and to situations involving approved strikes. *In the Matter of Newspaper and Mail Deliverers Union of New York and Vicinity and Interborough News Company*, 90 N. L. R. B. 2135, 2149.

tion 7.[4] The Senate resisted this attempt to so modify or amend that section. The House then withdrew its proposals relying on the fact that the Labor Board and the courts previously ruled that many of the activities described in the House bill were not protected concerted activities. Moreover, it was believed that the enumeration of specific unprotected activities might imply that unlawful conduct not otherwise described in the amended Section 7 was protected.[5] 1 Legislative History of the Labor Management Relations Act 1947, pp. 542-543.

Plainly, the design of the Act was to put a rein on activities of the unions and employees previously held protected under the Wagner Act, and to insulate "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building and Construction Trades*, 341 U. S. 675, 692.

The Petitioners' contention that the secondary activity engaged in by the Union, in this instance, is protected concerted activity because it is not prohibited under Section 8(b)(4)(A) is specious. Section 8(b) is not a correlative of Section 7; it speaks only of labor organizations and their representatives, whereas Section 7 is concerned with the rights of employees. While it may be argued that employees who engage in activities proscribed by Section 8(b) are not protected by Section 7, the converse is not necessarily true. A union and its members who engage in conduct which does not violate Section 8(b) are not, thereby engaged in protected concerted activities. In the *Matter of*

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[4] Included in the definition of unprotected concerted activities were sympathy strikes, jurisdictional strikes, illegal boycotts (see, H. R. 3020, Section 2(14), defining illegal boycotts), among others. H. R. 3020. 1. Legislative History of the Labor Management Relations Act 1947, pp. 168, 204-207. Furthermore, the House of Representatives considered "picketing a place of business at which no labor dispute exists" to be an unlawful concerted activity. Ibid. p. 335.

[5] Section 7 was amended, of course, to guarantee to employees the right to refrain from engaging in concerted activities.

Perry Norvell Company, etc., 80 N. L. R. B. 225; *National Labor Relations Board* v. *Thayer Co. et al.*, 213 F. 2d 748 (C. A. 1). When a union and its members violate a labor contract, there is no unfair labor practice committed either by the Union or the employees. However, the employees who strike in violation of a contract, are not engaged in a protected concerted activity.

In the recent case of *Textile Workers Union of America, CIO, et al.* v. *N. L. R. B.*, —— F. 2d —— (C. A. D. C.) 29 L. C. (CCH), Paragraph 69,515, the union, in the course of collective bargaining engaged in various harassing tactics. The Labor Board held that the union committed an unfair labor practice. The Court of Appeals for the District of Columbia rejected the Board's finding but added:

> "Courts have held that similar union tactics are 'unprotected' in the sense that employers may lawfully discharge employees for using them."[6]

A contrary conclusion would lead to a *reductio ad absurdum*: a strike in violation of a collective labor agreement is not prohibited by Section 8(b)(4)(A); therefore, it is protected as a concerted activity under Section 7. The absurdity becomes more apparent when it is tested by the standard of recent decisions by the Labor Board and this Court holding that a strike in violation of a labor contract, not connected with a union unfair labor practice, is not a

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[6] The question as to the protected or unprotected character of activity arises, generally, in instances where an employer discharges the employees and is charged with an unfair labor practice. If the employees have engaged in an unprotected activity, the employer cannot be charged with an unfair labor practice. *National Labor Relations Board* v. *Rockaway News Supply Company, Inc.*, 345 U. S. 71; *In the Matter of Dorsey Trailers, Inc.*, 80 N. L. R. B. 478, enforcement denied, 179 F. 2d 589 (C. A. 5).

protected concerted activity.[7] If Petitioners' construction prevails, a union may violate collective labor agreements with impunity so long as it is sufficiently ingenious not to commit a simultaneous unfair labor practice.

To be sure, there is no precise definition of the phrase "concerted activities"; but it seems clear that both the Labor Board and the courts will hold activities outside the scope of Section 7 where the objective is inconsistent with the terms of the clearly enunciated policy of this Act or other federal statutes. To illustrate: an agreement between a union and employers to boycott the product of an out-of-state manufacturer which is not accompanied by an inducement of employees of a neutral employer to strike does not offend against Section 8(b)(4)(A). It does, however, violate the Sherman Act. *Allen Bradley Company, et al.* v. *Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U. S. 797.[8] Obviously, Congress did not intend to immunize such boycotts against state or federal court action.

(B) The Railroad Has Standing to Institute This Action.

Concededly, if the motor carrier employers had discharged the striking employees for engaging in the partial strike at the Respondent's premises, the discharge would not have been an unfair labor practice. *In re W. L. Mead, Inc. etc.*, 113 N. L. R. B. No. 109, 36 LRRM 1392. It is true, of course, that the railroad is a stranger to the relationship between the motor carrier and their employees. But the only defense which the Petitioners and the em-

[7] The cases are set forth in Respondent's principal brief (pp. 22-23). A partial strike, such as engaged in by the motor carrier employees was condemned in *C. G. Conn, Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390 (C. A. 7), and this case was cited with approval by the Supreme Court in *International Union, U. A. W. etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 257.

[8] Congress did intend to proscribe the kind of activities involved in the *Allen-Bradley* case. But in such a case, there would be no violation of Section 8(b).

ployees might assert in any action to enjoin the Petitioners is the one advanced by the Petitioners, namely, that they were engaged in protected concerted activities. This defense, however, assumes, contrary to fact and law, that the strike and picketing were "concerted activities" within the meaning of Section 7. Acting upon this unproven assumption, Petitioners suggest that the State court was without jurisdiction. This leads Petitioners to reliance upon the doctrine of preemption. But there is preemption only where the conduct of the employees is protected by Section 7 or forbidden by Section 8(b)(4)(A). *International Union, U.A.W., etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

The force of this argument is not attenuated by the decision in *International Union of United Automobile, etc. Workers, etc.* v. *O'Brien*, 339 U. S. 454, which involved a case of a state law which nullified the federal right to engage in protected concerted activities. In short, the foundation of the doctrine of preemption is the existence of a subject covered by a federal law, or, at least, a clear expression of a Congressional intention to occupy a whole field. No such clear expression appears in the Act.

In this case, the Massachusetts Court was free to act because the picketing at the railroad's premises and the coercive prohibition against loading and unloading of trailers amounted to a tortious interference with the railroad's business relationships and a boycott in violation of the applicable Massachusetts statutes.[9] *Giboney, et al.* v. *Empire Storage and Ice Company*, 336 U. S. 490. These activities were neither protected nor prohibited by the Labor Act. This is, indeed, "an instance of injurious conduct which the National Labor Relations Board is without express power to prevent." *Garner* v. *Teamsters, Chauffeurs, and Helpers, Local Union No. 776 (AFL) et al.*, 346 U. S. 485, 488.

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[9] The Massachusetts statute prohibits a secondary boycott even in the absence of an inducement of employees of a secondary employer to engage in a strike (Respondent's Brief, Appendix pp. vii-viii).

The Labor Board has no power to forbid a strike because its method is illegal. "Policing of such conduct is left wholly to the states." *International Union, U. A. W., etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 253.

So long as the Respondent was directly injured by Petitioners' conduct, the Massachusetts Courts had jurisdiction and the question of Respondent's standing to maintain the suit was a matter for determination by that court. So, too, the scope of the injunction was solely within the competence of the Massachusetts Court. That Court had the power to fashion the necessary equitable relief and the injunction is not subject to review by this Court unless the Massachusetts Court impinges upon a federal right.

CONCLUSION

The Petitioners' conduct did not constitute a violation of Section 8(b) of the Act; the picketing activity of the employees did not amount to concerted activities within the meaning of Section 7; accordingly, the actions of the Petitioners were regulable by the State court.

Respectfully submitted,

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